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John Gallinger

Sarah Arnott

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THE RIGHTS OF SURFACE OWNERS OVER FEDERALLY RESERVED COAL AS DEFINED BY FEDERAL SURFACE MINING LEGISLATION

John Gallinger* and Sarah Arnott**

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I. INTRODUCTION

The early 20th century policy of granting homesteaders and stockraisers only the surface estate and reserving subsurface coal for the federal government created longstanding conflicts which until recently escaped legislative attention. The passage of the Surface Mining Control and Reclamation Act of 1977¹ attempted to settle such conflicts. Whether Congress succeeded is the subject of this article. Principal attention will be directed to the surface owner protection provision.² The background to the conflict, the legislative history and

* Mr. Gallinger is a partner in the law firm of Crowley, Haughey, Hanson, Toole and Dietrich of Billings, Montana. He has B.A. and J.D. degrees from the University of Wyoming and is a former special assistant to the General Counsel of the Federal Trade Commission.

** Ms. Arnott has a B.A. degree from St. Olaf College and attended the University of Chicago Law School before operating a ranch with her husband in Central Montana. She is a student at the University of Montana School of Law.

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1. 30 U.S.C. §§ 1201-1328 (1979).

2. 30 U.S.C. § 1304(a) reads: "The provisions of this section shall apply where coal owned by a surface owner as defined in this section is to be mined by methods other than underground mining techniques." The rights of private surface owners where coal is owned by another private party are not addressed by the Act. Early versions of the Act made no distinction between split estates containing public and privately-owned coal. See *Proposed Regulation of Surface Mining Operations: Hearings on S. 425 and S. 923 Before the Senate Comm. on Insular Affairs*, part 1, 93d Cong., 1st Sess. 63-64 (1973) [hereinafter cited as 1973 *Hearings*, part 1]. The constitutionality of extending consent regulations to private split estates was questioned. One such objection can be found in *Regulation of Surface Mining Operations: Hearings on S. 425 and S. 923 Before the Senate Comm. on Insular Affairs*, part 2, 93d Cong., 1st Sess. 867-888 (1973) [hereinafter cited as 1973 *Hearings*, part 2] (statement of Ernest Preate, Jr., Scranton, Pennsylvania). See also SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, SURFACE MINING CONTROL AND RECLAMATION ACT OF 1975, S. REP. NO. 28, 1st Sess. 178 (1975), "State laws concern the resolution of any disputes about property rights which might arise from such [split estate] separations, and this Act does not at-

underlying policies of the provision, and the problems likely to develop under the provision from a private attorney's point of view will be considered. For purposes of completeness, particular difficulties likely to arise under the Department of the Interior's regulatory implementation of the provision are also reviewed.

II. BACKGROUND

Almost all of the mineral resources in the eastern part of the United States were privately acquired as incidents to the acquisition of agricultural land.³ The mining conservation movement of the early 20th century decried this national loss. President Theodore Roosevelt reacted specifically by reserving possible coal lands for federal use, withdrawing 66 million acres, much of which was excellent agricultural land, from use.⁴ The conflict between reserving coal for the nation's future and making the land available for agricultural development was resolved by a compromise hailed as a strong conservationist measure.⁵ Under the compromise, mineral and surface rights were separated with the mineral rights being retained by the federal government and surface rights being patented for agricultural purposes.⁶ Most of the surface rights acquired in this manner were settled under the Enlarged Homestead Act of 1909,⁷ and the Stockraising Homestead Act of 1916.⁸

The acts extended the policies of earlier homesteading laws to the unique conditions of farming and ranching in semi-arid regions. The philosophy of such previous laws, that the public domain should be made available to actual homebuilders, was retained.⁹ The Enlarged Homestead Act made available nonirrigable land in nine western states and territories. Three hundred twenty acres were given to any homesteader who resided on and cultivated a portion of the land for five years.¹⁰ By 1916, however, it was recognized that lands still available

tempt to tamper with such state laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights. However, with regard to lands where the Federal government owns the coal, but not the surface estate, the bill does provide for some departure from existing practice.

3. B. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES*, 515-17 (1965) [hereinafter cited as HIBBARD].

4. *Id.* at 523. Much of this land did not contain coal and was reclassified as land which could be entered under appropriate acts.

5. *Id.* at 524.

6. *Id.* This suggestion appears to have been first made by James Garfield in 1907 when he was Secretary of State.

7. Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (1909).

8. Stockraising Homestead Act of 1916, ch. 9, 39 Stat. 862 (1916).

9. L. MALL, *PUBLIC LAND AND MINING LAW* at 3-39 (1979) [hereinafter cited as MALL].

10. HIBBARD, *supra* note 3, at 393.

in the West were suitable primarily for grazing rather than farming. A larger grant of land was necessary to support a family under these circumstances and Congress increased the amount a homesteader could claim to 640 acres in the Homestead Act of 1916.¹¹ With the passage of the act, Congress defeated a movement to retain government ownership of remaining lands and lease them for grazing.¹² The Jeffersonian ideal of farmers making the land their own through individual efforts was retained.¹³

The severance of subsurface coal from the surface estate was accomplished by the Coal Lands Acts of 1909¹⁴ and 1910¹⁵ and the Stockraising Homestead Act of 1916.¹⁶ The 1909 act protected persons whose land was withdrawn from entry, because the land was found to contain valuable coal deposits, before a patent was issued. The entryman could elect to receive a patent reserving all coal to the United States.¹⁷ The 1910 act made areas formerly withdrawn from entry as coal lands subject to the homestead acts with the coal, however, being reserved to the United States.¹⁸ The effect of this act was to open large new areas to entry under the Enlarged Homestead Act of 1909. The Stockraising Act provided for the granting of patents as discussed above, but all mineral deposits were reserved to the United States.¹⁹

11. MALL, *supra* note 9, at 4-3.

12. MALL, *supra* note 9, at 4-3.

13. 52 CONG. REC. 520-21 (1915) (remarks of Rep. Baker):

One of the purposes of the bill is to restore and improve the grazing capacity of the lands, and therefore stock raising and meat-producing capacity of the semiarid lands of the West, and at the same time to furnish homes thereon for the people of this country who are desirous of acquiring a home in the semiarid country. . . . We want homes and not tenants even if the Government of the United States should be that landlord. If water should be later discovered by boring deep wells, then so much the better. The pioneer, who has gone through all the hardship and privations, will be the man to be benefited. We hope he may.

14. 30 U.S.C. § 81 (1979).

15. 30 U.S.C. § 85 (1979).

16. Stockraising Homestead Act of 1916, *supra* note 8.

17. Coal Lands Act of 1909, *supra* note 14. Section one reads, in part:

[A]ny person who has in good faith located, selected or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefore, which shall contain a reservation to the United States of all coal in said lands. . . .

18. Coal Lands Act of 1909, *supra* note 15. Section three reads, in part:

That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same.

19. Stockraising Homestead Act of 1916, *supra* note 8. Section nine reads, in part: That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other

The rights and duties of those who claim through statutory patents are governed by the language of the statute. The rules and results in private severance cases have little applicability to the questions raised by patent severances.²⁰ Federal grants of land and resources are "to receive such a construction as will carry out the intent of Congress."²¹ And though numerous cases adhere to the principle that Federal grants are to be construed in favor of the government,²² "they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . ."²³

The same rules apply when determining the extent of government grants reserving minerals. Professor Howard Twitty, commenting on the different approach used when evaluating the rights and obligations of holders of split estates created by deed and those created by statute, said:

Where the mineral and surface estates have been severed by a deed of private parties, it is necessary to construe the deed severing these estates to determine what the parties to the deed intended should be the rights and obligations of the owners of the two estates. Where the mineral and surface estates vest in different parties as a result of the issuance of a patent by a governmental body pursuant to statute, it is necessary to construe the statute and patent issued thereunder and ascertain the legislative intent in order to determine the respective rights and obligations of the owners of the two estates. . . . Cases involving one method of severing land into two estates are not a reliable guide to ascertain the rights and duties of the owners of two estates severed by the other method.²⁴

Unfortunately, the language of the Coal Lands Act and the

minerals in the lands so entered and patented, together with the rights to prospect for, mine, and remove the same.

20. See Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations*, 6 ROCKY MTN. MIN. L. INST. 497 (1961) [hereinafter cited as Twitty]; Mall, *Federal Mineral Reservations*, 10 LAND AND WATER L. REV. 1 (1975); Haughey & Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States*, 22 ROCKY MTN. MIN. L. INST. 145 (1976).

21. "To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979). (quoting *Winona and St. Peter R. Co. v. Barney*, 113 U.S. 618, 625 (1885)). Rule followed in *United States v. New Mexico*, 438 U.S. 696 (1978); *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir. 1977); *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957).

22. See *Caldwell v. United States*, 250 U.S. 14 (1918); *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957); *Andrus v. Charlesstone Stone Products Co.*, 436 U.S. 604 (1978).

23. *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979) (quoting *United States v. Denver and Rio Grande R. Co.* 150 U.S. 1, 14 (1893)).

24. Twitty, *supra* note 20, at 497.

Stockraising Homestead Act has proved to be an inadequate guide to rights in the modern surface mining situation. The 1909 Coal Lands Act provided that no one could enter lands affected by the act for purposes of prospecting and mining without the prior consent of the owner "except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction."²⁵

The Coal Lands Act of 1910 required that those qualified to enter for prospecting purposes receive the approval of the Secretary of the Interior and post a bond for damage to crops and improvements.²⁶ Qualified miners could carry on activities reasonably necessary to mining and were liable for "damages caused thereby to the owner thereof, or upon giving a good and sufficient bond"²⁷

The Stockraising Homestead Act of 1916 gave qualified persons the right to enter and prospect for minerals, provided they did not damage permanent improvements and they paid for any crop damage caused.²⁸ Persons who were entitled to mine were allowed to occupy as much of the surface as was reasonably necessary after "securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof; or third, in lieu of either of the foregoing provisions, upon the execution of a good or sufficient bond . . ." to the benefit of the surface owner.²⁹

The 1910 and 1916 acts were similar, giving compensation to the surface owner for damage to crops and improvements. The 1909 act gives greater surface owner protection, providing for compensation for damages not limited to crops and improvements. Uniformity was intended to be provided by virtually identical 1949 enactments,³⁰ one of which reads in part:

Notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip or open pit mining methods, any minerals

25. Coal Lands Act of 1909, *supra* note 14, Section one.

26. Coal Lands Act of 1910, *supra* note 15. Section three reads, in part:

Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting.

27. *Id.*

28. Stockraising Homestead Act of 1916, *supra* note 8, Section nine.

29. *Id.*

30. Act of June 17, 1949, ch. 221, § 2, 63 Stat. 201 and Act of June 21, 1949, ch. 232, § 5, 63 Stat. 215.

from the land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered to impair any vested right in existence on June 21, 1949.³¹

Thus, the specific protection granted to all surface owners affected by the Coal Lands Acts and the Stockraising Act was extended to damage caused by surface mining and compensation uniformly included damage to crops, improvements, and land to the extent of its value for grazing.³²

The rights of surface owners who resisted surface mining were uncertain under these severance patents and statutes. The Coal Lands Acts and the Stockraising Act did not specifically provide for surface mining activity, but neither did they forbid it and no cases have been found deciding the issue. There are those who argue that full scale surface mining was obviously not within the contemplation of Congress when the patents were issued. Persons making that argument have used the rationale presented before Congress by those who advocated allowing the surface owner to withhold consent to surface mining: "What may have been appropriate protection in 1909 when coal was primarily extracted by underground mining methods simply fails in light of the surface mining technology of 1974."³³ Even after the 1949 act, which specifically mentioned damages incurred from surface mining, it could have been argued that the kinds of damage incurred by the technological methods of the mid-seventies were not those contemplated in an act written twenty-five years earlier. Most important, homesteaders made their claims and developed their ranches with the expectation of perpetual ownership and control of the land.

On the other side, it has been argued that in reserving federal coal for later use, Congress must have foreseen the possibility of destruction of the surface where necessary to carry on the mining project. There was little point in conserving minerals for future generations if the

31. *Id.* Act of June 21, 1949.

32. One consent provision proposed as part of the Surface Mining Act used a formula based upon consent, or, in lieu of consent, the execution of a bond for the benefit of the surface owner for damages to crops, improvements and damages to the surface estate. The Senate Committee on Interior and Insular Affairs stated, "It follows the rule used for many years where the Federal Government owns the minerals." S. REP. NO. 402, 93d Cong., 1st Sess. 47 (1973).

33. H.R. REP. NO. 1072, 93d Cong., 2d Sess. 112 (1974). It could also have been argued that the provisions in the 1910 and 1916 Acts for compensation for damages to "crops and improvements" implied that no further destruction was contemplated.

owner of the surface estate could prevent mining because it interfered with the use of the surface.³⁴

Prompted in the early 1970's by the nation's energy needs and the prospect of massive strip mining, Congress began the laborious task of writing comprehensive surface mining legislation.³⁵ Because of ease of access and the low-sulphur content of western coal, surface mining in western states was increasing at a rapid rate and more mining was predicted.³⁶ Sixteen million acres of available western coal was federally reserved under the various homestead patents, and Congress was faced with finally clarifying the rights of surface owners.³⁷

Until Congress acted in 1977, parties negotiated as best they could in this uncertain area. Coal operators may have believed that the patent severance acts gave them the right to mine without surface owner

34. Twitty, *supra* note 20, at 514.

35. *Regulation of Surface Mining Operations*, 1973 *Hearings*, part 1. (statement of Ken Heckler, U.S. Representative from West Virginia):

The strip mining of coal has been skyrocketing upward at an alarming rate. In 1969, 38 percent of all coal was stripped and auger mined; in 1970, that percentage was 44 percent; in 1971, for the first time in history, more coal was strip mined and auger mined than deep mined. . . . It is interesting to note that more than 24 percent of the grand total of strip mined production in this country has occurred since 1968. Because of the huge strippable reserves in Wyoming, Montana, Colorado, and the West, and the likelihood that the new strip mining laws will stimulate a last minute rush to strip before regulation becomes effective, we can look for a sharp increase in strip mining and its effects in 1973 and 1974.

The actual acres mined have not been great. The amount actually consumed in Montana in 1975, exclusive of railroads, equipment sites, and other installations was about 530 acres. *See* MONTANA ENERGY ADVISORY COUNCIL, MODEL MINE COAL DEVELOPMENT INFORMATION PACKET, 51 (1974). This does not make the rights involved any less important, however.

36. *See* U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, DRAFT ENVIRONMENTAL STATEMENT, FEDERAL COAL MANAGEMENT PROGRAM, 2-10 (1978) [hereinafter cited as 1978 DRAFT ENVIRONMENTAL STATEMENT]. The 1970 Clean Air Amendments made low-sulphur western coal more economical than eastern coal, which had previously had the advantage of lower transportation costs to eastern generators. The passage of the 1977 Clean Air Amendments, however, requires that most western coal will also require the use of pollution control equipment. But the demand for western coal is still expected to be great because of the growing energy needs of western power plants and industries.

37. 123 CONG. REC. S. 7997 (1977). 1974 statistics state that the United States has issued 55,618,288 acres in patents that reserve coal to the Federal Government. Public Land Statistics 1974, U.S. Dept. of the Interior, Bureau of Land Management, Table 17, p. 46. *Cf.* H.R. REP., *supra* note 33, at 242:

Section 710—Protection of the Surface Owner. The Interior Department estimates that about 14.2 billion tons of Federal coal underlie non-federally owned surface lands. The National Coal Association estimates that the figure is about 37.5 billion tons. The National Coal Association estimate may be closer to the correct figure and could even be conservative.

See also Regulation of Surface Mining Operations: 1973 *Hearings*, part 2 (statement of Malcolm Wallop, State Senator from Wyoming): "[S]omething in the neighborhood of 50 percent of Wyoming's surface belongs to the Federal Government, and in excess of 70 percent of our mineral wealth rests in the same hands."

approval, but when confronted with a resisting landowner, the issue frequently was not worth litigating.³⁸ Also, some states had passed restrictive legislation protecting surface owners. Although coal companies thought the state acts were unconstitutional when applied to federally reserved coal, judicial challenges were seen as potentially damaging to public support of coal development and were never pursued.³⁹ Coal operators protected themselves by purchasing the surface rights to coal lands they wished to lease, often leasing back to the resident farmer or rancher who continued to operate as much of the agricultural unit as was feasible.⁴⁰ There were reports of excessive sale prices being demanded by surface owners.⁴¹ On the other hand, some surface owners claimed that they sold their property in the face of threatened condemnation suits by coal companies.⁴² The uncertainty

38. Burgess, *Surface Mining Impact on the Landowner's Agricultural Operation*, 22 ROCKY MTN. MIN. L. INST. 451, 454-58 (1976).

39. *Id.* at 456. See also Surface Mining Control and Reclamation Act of 1977: *Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Insular Affairs*, part 2, 95th Cong., 1st Sess. 139 (1977) [hereinafter cited as 1977 *Hearings*, part 2] (statement of W.P. Schmechel, President of Western Energy Co.): "Under current practice in Montana, at least, there is virtually no way that we can enter upon the land of a man who adamantly refuses to consider any mining operation."

40. See *Surface Mining Control and Reclamation Act of 1977: Hearings on H.R. 2 Before the Subcomm. on Energy and the Environment of the House Comm. on Insular Affairs*, part 4, 95th Cong., 1st Sess. 182 (1977) [hereinafter cited as 1977 *Hearings*, part 4] (statement of Marcus L. Nance of Birney, Montana): "Most land owners in our area have made legal commitments to their satisfaction. Energy companies have bought ranches with the rancher making a lease back arrangement. Some energy companies have negotiated straight surface leases with the land owner." See also 1977 *Hearings*, part 2, *supra* note 39, (statement of W.P. Schmechel, President of Western Energy Co.), "[T]he language of the conference report and of H.R. 2 prohibits what has been a fairly common and highly satisfactory practice in Montana and one which should be permitted; that is the practice of selling outright the ranch or the section of the ranch of concern to the mining operator."

41. 1973 *Hearings*, part 1, *supra* note 2, at 395 (from MONTANA OUTDOORS, January/February 1973): "But Redding didn't sell, doesn't like the idea of looking out of his window each morning and seeing a strip mine, insists he was told he would have to move from his land after mining began and has his own ideas on what his land is worth. 'I have a million dollars-a-section figure in my mind and it sounds awfully good to me. I think its worth that, but I'm still not crazy about letting it go.'"

42. *Id.* at 394. "Being the surface is owned by private citizens," Pemberton Hutchinson, President of Westmorland, told MO, "you either have to get them (the ranchers) to sell it to you under their own free will or exercise the right of the law utilizing condemnation proceedings." Normally, Westmorland *et al.* go in, pay the landowner damages and mine the land. "But suppose," Hutchinson notes, "the landowner won't agree, period. Then the miner only has two alternatives: (1) to not disturb the land—walk away from it or (2) to proceed against the landowner under condemnation suits. "We've gotten enough people to agree that, at least for the time being we don't have to go that route." See also 1973 *Hearings*, part 1, *supra* note 2, at 241 (Statement by Governor Tom Judge of Montana), "One problem we have with respect to these various rights has been on the fact that the private landowners, some of which were not interested in a railroad crossing their land or even mining coal, had no rights to the subsurface mineral rights and the State had an eminent domain law that included the right to condemn land for the mining of coal and other miner-

was prolonged, as a bill which was acceptable to both Congress and the Administration was not passed until 1977.⁴³

III. LEGISLATIVE HISTORY

Throughout the legislative history of the Surface Mining Act, provisions protecting surface owners were some of the most controversial.⁴⁴ Legislation introduced in the 93rd Congress would have required that federal coal reserved in patents be mined only upon the consent of the surface owner.⁴⁵ A House committee report noted that the homestead acts had provided for surface owner consent or the payment of damages suffered in the mineral recovery process, but the committee found that current surface mining technology made such compensation inadequate.⁴⁶ Surface owners should therefore be al-

als. We have repealed that law because of the treatment some of the ranchers had received in eastern Montana."

43. A moratorium on coal leasing was imposed by the Department of Interior in 1970. BUREAU OF LAND MANAGEMENT, DIVISION OF MINERALS, HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES (1970). A near-total moratorium was continued in 1973. 38 Fed. Reg. 4682-83 (1973). The new coal leasing policy announced in January of 1976 lifted the moratorium on federal coal leasing. 41 Fed. Reg. 2648-50 (1976). In the meantime, coal companies worked the leases which had been issued prior to 1970. See 1978 DRAFT ENVIRONMENTAL STATEMENT, *supra* note 36, at 2-30. When the statement was published there were 534 outstanding Federal coal leases containing an estimated 17 billion tons of recoverable coal. Sixty-seven percent of that was recoverable by surface mining.

44. 1973 *Hearings*, part 2, *supra* note 2, at 969 (statement of Senator McClure): "I think that [the surface owner consent provision] may be one of the most emotional, one of the most technically difficult and potentially one of the most troublesome portions of the legislation." *Surface Mining and Reclamation Act of 1977: Hearings on S. 7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 11 (1977) [hereinafter cited as 1977 *Public Lands and Resources Hearings*] (statement of Senator Johnston of Louisiana):

I was just reading here on page 2 of the Secretary's statement about the so-called compromise over surface ownership that we worked out in the last hours of the conference committee last year. I well remember those weeks, and it may have been months, while we considered the Surface Mining Act in conference, and at the last minute it appeared the bill was going down to defeat because of inability to agree on that surface ownership.

Surface Owner Protection was still being hotly debated on the eve of passage. 123 CONG. REC. S. 7996 *et seq.* (1977).

45. Proposed Regulation of Coal Mining, H.R. REP. NO. 1072, 93rd Cong., 2d Sess. 46 (1974).

46. *Id.* at 112.

The Committee believes that requiring the consent of the surface fee owner in situations where the coal to be surface mined is obtained through a Federal lease is consistent with the history of Congressional concern that surface fee owners be appropriately protected from disruption resulting from the extraction of coal reserved to the United States. Indeed, the initial reservation of rights in the coal was approved by Congress in 1909 at President Theodore's Roosevelt's urging which was premised on his assurances that mining and agricultural surface uses need not be mutually exclusive. . . . It follows, therefore, that the Congress never contemplated that the reservation of coal to the United States would result in the extensive disruption to surface uses attendant to modern surface mining methods. Aware

lowed to withhold consent. Critics of the consent requirement contended that the provision allowed surface owners to tie up a natural energy resource and gave them "windfall profits" because coal operators, in effect, paid twice for the right to mine United States coal—once to the federal government and once to the surface owner.⁴⁷

Those in favor of a consent provision argued that the reservation of federal coal under homestead lands may have been a conservationist achievement, but it was accomplished at the homesteader's expense, the final "exploitation" now being achieved by the taking of land to reach federally reserved coal.⁴⁸ Congress had made a conscious choice between placing the surface in the hands of miners and farmers and had, as a matter of policy, decided that it was in the best interest of the nation that the surface be controlled by them.⁴⁹ It could not have been their intention that the entire surface could be taken back. Nor could a taking to that extent have been within the expectation of farmers who homesteaded or later acquired the land. The primary objective of the homestead acts had been a grant of land enabling the takers to achieve a livelihood from farming.⁵⁰

from the outset that the then existing mining technology could result in some limited interference of surface uses Congress required in the 1909 enactment either the surface owner's consent to the mining or the payment of damages to the surface owner resulting from extraction of the coal. . . . What may have been appropriate protection in 1909 when coal was primarily extracted by underground mining methods simply fails in light of the surface mining technology of 1975. Where coal belonging to the United States is to be surface mined, the payment of damages in lieu of the consent of the surface fee owner is inadequate. Only the fee surface owner's consent to the mining will truly protect his interest.

47. *Id.* at 228. The Committee's Dissenting Views read, in part:

Under the provisions of (the act), an operator who has obtained a lease from the Federal Government for coal owned by the Federal Government under lands whose surface has passed into private ownership, must obtain the written consent of the surface owner to enter the property to extract the coal. This grants to a surface owner an effective veto power over the disposition and mining of Federally owned coal. This is a new right in surface owners never before authorized by statute or common law. The elimination of the bonding and other alternatives to compensate the surface owner for damages to his estate is tantamount to a giveaway of Federal coal rights to the surface owner. The operator will be required to come to some agreement with the surface owner, possibly on conditions resembling blackmail. This could amount to a substantial windfall for the surface owner. The coal lessee is required to pay twice for the same coal—first to the Federal Government for the lease, including bonus and royalties; and second, he must pay the surface owner. It is unconscionable for the Federal Government to encumber coal owned by all of the people by granting a veto power to a single individual. . . . The surface owner is entitled to full compensation for actual damages to his surface estate, including the temporary loss of the use of his land, and such compensation as may be appropriate for inconvenience suffered as a result of that temporary loss of use.

48. 1977 *Public Lands and Resources Hearings*, *supra* note 44, at 686 (statement of Senator Lee Metcalf of Montana).

49. P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 729 (1968), cited in H.R. NO. 1072, 93d Cong., 2d Sess. 112 (1974).

50. See note 13, *supra*.

It was also claimed that mining in the absence of surface owner consent amounted to *de facto* condemnation⁵¹ and the "outright seizure"⁵² of the land. Mining was also resisted because ranchers, botanists and agricultural specialists were dubious that land in semi-arid regions could ever be reclaimed to its former productivity.⁵³

51. Regulation of Surface Mining: *Hearings on H.R. 3 and Related Bills Before the Subcomm. on the Environment and Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 1566 (1973) [hereinafter cited as 1973 Environment and Mining Hearings] (statement of Wallace McRae of Forsyth, Montana):

I have neighbors that are as enthusiastic about coal development as I am pessimistic. The only way that I can continue to operate my ranch, and yet allow my neighbor to exercise his right to sell out to the coal companies if he wants to, is to require the written consent of the landowner prior to prospecting for or mining coal. Requiring written consent would result in mining those lands first where the surface and mineral ownership is the same, and where the surface owners are willing to give up their ranches to profit from coal development. This would also prevent the forced sale or *de facto* condemnation of an unwilling owner's property.

52. 1977 *Public Lands and Resources Hearings*, *supra* note 44, at 625 (statement of Governor Judge of Montana).

53. 1973 *Environment and Mining Hearings*, *supra* note 51, at 1566 (statement of Wallace McRae of Forsyth, Montana): "Since I do not own the coal under most of my ranch, and cannot prevent my land being turned wrong side up, is their [sic] any assurance that the land, and hundreds of thousands of acres of other prospective mined land in the West, will ever be returned to productivity?" *see also* 1973 *Hearings*, part 2, *supra* note 2, at 997-1001. (statement of Dr. Robert Curry, University of Montana):

I want to talk about the area . . . in the Western United States, where precipitation is less than evaporation: where the potential moisture evaporated in a given year is greater than that which falls as rain. This constitutes some 90 percent of the Western United States. . . .

Basically, reclamation conditions, procedures and success in the Eastern United States, particularly in Appalachia, have little or no bearing on conditions to be expected in the Western United States. . . .

[T]he ground surface, once disturbed in the West, cannot recover to its present state of succession or subclimax vegetation without extremely long periods of geologic time—many times longer than we might expect man to inhabit the Earth. . . .

In recent years, geologist, soil scientists, and paleoclimatologists have learned that over much of the arid West, there appear to have been brief geologic periods favorable for soil formation, while during the bulk of the times of evolution of our land surfaces, soil development is so restrained that the land surface can merely cycle plant nutrients between existing soil minerals, soil biota and sparse plants in a very delicately balanced fashion.

This finding that we are now living in a unique period of time has come as a considerable shock to many, particularly to agricultural scientists because it means that we are now living in a period of time when natural conditions cannot be expected to maintain present ground covers should those ground covers and their geologic substrates be disturbed. . . .

[I]n the West, unless precious water is imported and the sites are watered down on the order of 200 to 2,000 years to simulate the naturally wetter conditions during the soilforming periods, reclamation to the point of self-sustenance is impossible. . . .

[J]ust because someone is able to reclaim an area for 1 year or 2 years and say, "See, here is a nice, pretty picture, and here is vegetation that is successful," that does not mean that that vegetation is adapted to the extremes of conditions that one could expect and native vegetation is.

Cf. Federal Coal Leasing Program: *Hearings on the Department of Interior's Future Leasing Program for the Federal Coal Resources of the Northern Great Plains Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular*

The various viewpoints were reconciled by a conference report recommending that consent be required, but limiting the amount of compensation a surface owner could receive.⁵⁴ This version of the bill was passed in December of 1974, pocket vetoed by President Ford and reintroduced in the 94th Congress as Senate Bill Seven.⁵⁵

Under the general legislative scheme contemplated by this bill, the Secretary was to refrain from leasing coal for surface mining "to the maximum extent practicable."⁵⁶ The consent of the surface owner, defined to include individuals and family corporations, was a necessary condition to the Secretary's leasing.⁵⁷ The most controversial portion of the bill limited payment to the consenting surface owner to the value of the surface estate, his costs, such as relocation, and other losses not to exceed \$100 per acre as determined by the Secretary.⁵⁸ Proponents of the bill believed the prospect of fair payment would persuade farmers to grant consent, thus preventing "locking up" of coal,⁵⁹ but the payments would not create a windfall to the surface owner and a burden the American public.⁶⁰ This version of the act was passed by Con-

Affairs, 93d Cong., 2d Sess. 661-65 (1974) (statement of Dr. Carl Wambolt, Society for Range Management).

54. H.R. REP. NO. 1522, 93d Cong., 2d Sess. (1974).

55. S. REP. NO. 128, 95th Cong., 1st Sess. 60 (1977).

56. S. REP. NO. 28, 94th Cong., 1st Sess. 164 (1975).

57. *Id.* at 166.

58. *Id.* at 165-67. When one eastern Montana landowner was told by his attorney that "The value of the surface owner's interest" to be fixed by the Secretary must include its higher value because of underlying coal deposits, [see 1977 *Hearings*, part 4, *supra* note 40, at 205], The Department of the Interior recommended to the Committee on Energy and Natural Resources that subsequent drafts "should be clarify so that it would apply to the fair market value of the 'surface estate based on its use for agricultural purposes and exclusive of the value of minerals or the right to consent under this section.'" S. REP. NO. 128, 95th Cong., 1st Sess. L09 (1977). This version of the bill also mandated that consents be obtained only by the Secretary of the Interior. "[T]he surface owner will be dealing solely with the Secretary in deciding whether or not to give his consent to surface coal mining. Penalties would be assessed to discourage the making of 'side deals' in order to circumvent the strict provisions governing surface owner consent." CONFERENCE REPORT, SURFACE MINING CONTROL AND RECLAMATION ACT OF 1974. H.R. REP. NO. 1522, 93d Sess. 72, 82 (1974) [hereinafter cited as 1974 CONFERENCE REPORT].

59. 1974 CONFERENCE REPORT at 82, "[S]o that there will not be any undue locking up of Federal coal, generous compensation is guaranteed to the surface owner, based not only upon the market value of the property but also the costs of dislocation and relocation, loss of income and other values and damages."

60. *Id.* at 81.

[C]ontemplated surface mining operations, particularly in the West where coal of as much as 100 feet in thickness may lie as many as 80 feet underneath the surface of the land, may in the opinion of the conferees result in a massive upheaval of the surface land.

The Senate bill dealt with this problem by prohibiting any leasing of Federal coal lying under land not owned by the United States. The House amendment instead provided that such coal could be leased but not without the consent of the surface owner. The conferees agreed that neither approach was wholly right. Just as there should not be an absolute prohibition to development of a natural resource belong-

gress and vetoed by President Ford in May of 1975.⁶¹

When the 95th Congress again addressed the question of surface mining, a variety of consent provisions were examined. The Mansfield Amendment proposed a ban on surface mining of all federally owned coal under privately owned surface.⁶² This amendment was opposed because of the fear that surface mining would be forced into areas more difficult to reclaim.⁶³ Suggestions that surface owners be dislocated and compensated for their losses, regardless of their opposition, were rejected by those representing the interests of the Western states.⁶⁴ Relocation was not seen as a simple solution for those whose families had spent up to 100 years developing a ranching operation,⁶⁵ and finding a comparable farm or ranch could not be assured.⁶⁶

ing to all the citizens of the Nation, particular when there is an energy crisis, so there ought not to be an opportunity for an individual owning land to reap a wind-fall in order to obtain his consent.

61. G. FORD, VETO OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1975, H.R. DOC. NO. 160, 94th Cong., 1st Sess. III (1975).

62. Senator Mansfield's opinions were expressed early in 1973 *Hearings*, part 1, *supra* note 2, at 97-98:

These coal deposits (the low-sulphur coal deposits of the West) may be the easiest solution but we are not going to stand by and let the large fuel corporations dig up eastern Montana until the reserves are exhausted or they have discovered an alternative. . . . [W]e should look at some of the causes of the energy crises—too little concern with conservation of energy. . . . The Federal Government should be channeling more money into research and development of alternative sources of energy. . . . I see no need to rush into coal development in the West. We need extensive preplanning, strong reclamation requirements with appropriate enforcement. . . . We need to know whether reclamation can succeed in eastern Montana.

Mansfield's amendment would have also protected the rancher who chose to withhold consent and continue to ranch but had to live "with the ongoing mining, blasting, and other degradation. . . . without hope of compensation." 1977 *Public Lands and Resources Hearings supra* note 44, at 638 (letter from Edward Dobson, Northern Great Plains Representative, Friends of the Earth). The amendment was also supported because of the large numbers of outstanding leases (*see* note 43, *supra*) and because of support for the deep-mining industry. 1977 *Public Lands and Resource Hearings* at 836 (statement of Gerald Moravek, Powder River Basin Resource Council).

63. 1977 *Public Lands and Resources Hearings, supra* note 44, at 579 (statement of Governor Ed Herschler of Wyoming). Difficulty in planning was cited in opposition to the amendment. *See* 1977 *Hearings*, part 2, *supra* note 39, at 174-75 (statement of Marcus L. Nance, Birney, Montana):

[W]e have many different types of ownership. . . . In our area, for example, we have state lands, Burlington Northern lands, private lands and a combination of one owning the surface and others owning the minerals. To obtain a proper land use plan . . . it would be nearly impossible in most cases if one or more of these mineral ownerships were deleted from the mining or reclamation plan.

64. *See* 1973 *Hearings*, part 1, *supra* note 2, at 98 (statement of Senator Mike Mansfield of Montana): "The rights of the individual who owns the surface of the land must be given consideration. I still believe that if a man wants to be a rancher, he should be able to do so except under very unusual circumstances and I am not aware of any in eastern Montana."

65. *See* 1977 *Public Lands and Resources Hearings, supra* note 44, at 709.

66. *See* 1973 *Environment and Mining Hearings, supra* note 51, at 1306 (statement of Carolyn Alderson of Birney, Montana):

The compromise provision requiring surface owner consent but limiting compensation met considerable opposition in the 95th Congress. The parties involved uniformly objected to a regulatory price setting.⁶⁷ Mining operators predicted that surface owners would solve the dilemma by withholding consent.⁶⁸ Others thought it more likely

The obvious solution for those of us who don't buy the reclamation idea is to sell out and go buy another ranch. At least it is obvious until one realizes that there are several million acres in the Fort Union formation underlain with strippable coal, over 800,000 in Montana alone. The land underlain by coal does not include the land that will be taken up with towns, gasification plants, thermal generating plants, transmission lines, pipelines, roads, and dams.

Further homesteading is, of course, not available because of the effective closure of the public domain by the withdrawals made pursuant to the Taylor Grazing Act of 1934. (43 U.S.C. § 315(f).)

67. See *Surface Mining and Reclamation Act of 1977: Hearings Before the Subcomm. on Public Lands and Resources of the House Comm. on Energy and Natural Resources*, part 1, 95th Cong., 1st Sess. at 185 (1977) [hereinafter cited as 1977 *Hearings*, part 1] statement of Dan Hinnaland, Brockway, Montana: "I believe that decisions regarding the sale, lease or any other disposition of one's land is an individual property right and should not be legislated." Relevant, but not discussed is the general economic proposition that one who has not sold his property values it at more than the market price. A rancher may also think the prevailing price is less than its expected agricultural value. See 1977 *Public Lands and Resources Hearings*, *supra* note 44, at 774 (statement of Wallace McRae, Forsyth, Montana), "I think the surface owner and the perspective [sic] lessee of that coal is in a much better position to appraise value than some three-man arbitration board. . . . I don't think any three appraisers, no matter how qualified, really know the value, the long term value." Cf. 123 CONG. REC. S 8002 (1977) (remarks of Senator Wallop):

With regard to the questions raised by the Senator from Colorado, in which he has made the statement that the surface holder would be made whole, there are many of us who have fought these battles for a long time, at the State level and at other levels, who question how whole in those lands anybody can ever be made, regardless of the findings that will be made prior to mining. The product you get back will not be the product you gave up. It will be a synthetic creation of machines, men, possibly irrigation. But nobody will know for 20, 30, or 40 years, despite the best judges around, whether this is really going to be something that makes you whole.

On top of that . . . a ranching operation gets split in half. It is not economically pursuable any longer. You cannot make somebody whole, and you cannot really compensate them for that length of time.

Cf., 1977 *Public Lands and Resources Hearings* at 774 (statement of Wallace McRae, Forsyth, Montana), "If it takes some 50 years to mine that coal, I don't think anybody can build in the appreciation of land value factor into that and have me go on and operate the ranch around a coal mine."

68. A combination of the mandate to the Secretary and the unrealistic limitation on the amount which a surface owner can receive for his land will serve to unreasonably discourage action by the Secretary and the surface owners who might otherwise approve of and desire development of the coal reserves underlying the land.

1977 *Hearings*, part 3, *supra* note 39, at 411 (statement of John Paul, Vice President of Public Affairs for Amax Coal Co.). See also 1977 *Hearings*, part 2, *supra* note 39, at 139 (statement of W.P. Schmechel, President and Chief Operating Officer, Western Energy Co.): "The language in H.R. 2 . . . is equally disruptive because it destroys any incentive for a surface owner to permit mining of Federal coal on his land. The result in practice will be precisely the same as the result of the Mansfield amendment."

they would sell the surface to mining operators.⁶⁹ Replacing family farms and ranches with corporate ownership was not seen by Congressmen as being in the nation's best interest. Specifically, the continued presence of surface owners with long-term agricultural interests might be an important guarantee of diligence in the reclamation process.⁷⁰

Congress may have been most influenced by the testimony of mining representatives who thought it only fair that surface owners be allowed to negotiate individually with coal operators.⁷¹ The president of Western Energy Company testified that few surface owners were, in fact, adamantly opposed to mining and few made exorbitant demands

69. This subsection gives a "surface owner" within the subsection (g) definition a veto right over the leasing of federal coal under his land. Subsection (m) prohibits any person from inducing a surface owner to give consent, and a surface owner from receiving anything of value for giving consent, is subject to a penalty. However, nothing prevents the surface owner from selling his ranch to, for example, a coal company that would not have the right (or the desire) to veto the federal leasing of underlying coal. There seems to be no valid policy reason for permitting a rancher to sell his ranch, and in the process receive additional compensation because of the relationship of the surface rights to the underlying coal, while prohibiting him from receiving payment for granting consent to mining under circumstances that would perhaps allow him to continue ranching part or all of his property, subject only to the disruption that would occur during actual mining. An apparently unintended result of this subsection may be to make it substantially more profitable for a long-time rancher to sell his ranch outright to a coal company, rather than go through the consent procedures set forth in the subsection, and therefore be limited to the compensation permitted under subsection (e).

1977 *Hearings*, part 2 at 204-05 (statement of Burton Brewster, Mark Nance, Jack Knobloch, and Dr. Art Hayes, all of Rosebud County and of Dan Hinnaland and Pete Jensen of McCone County, Montana). See also 123 CONG. REC. S 8003 (1977) (remarks of Senator Wallop):

In the Ruhr area of West Germany, the biggest single landowner is no longer small farmers; it is coal companies. This amendment would have the effect of forcing people to leave small agricultural holdings and put agricultural holdings and most agricultural land in the hands of coal companies. It would actually do that. I realize the distinguished Senator from Louisiana thinks he is going to be keeping people on the land with this but, as a matter of fact, it will be exactly the opposite.

70. It is far easier and far simpler just to buy the rights of the surface owner. I submit that is not—I repeat, is not—in the best interest of the West. I think most of us would agree we would like to see family operations preserved.

This alternative to surface consent, in my mind, simply invites the surface owner to accept an offer from a coal company to sell out to them. . . . There is a second point that has been made that I think is valid. That is, if we were to afford the sort of surface owner protection that I have tried to describe, we would guarantee or we would move toward guaranteeing the presence of a surface owner whose long-range interests were separate and apart from those of the mining company itself and that you might expect there would be a closer follow-up, or closer monitoring, of the reclamation process all the way through.

1977 *Public Lands and Resources Hearings*, *supra* note 44, at 636 (statement of Senator Hansen of Wyoming).

71. "No Montana rancher in his right mind is going to agree to have his land disrupted and his ranching operations interrupted for a period of years in exchange for the money value of the surface owner's interest as fixed by Government regulation." 1977 *Hearings*, part 2, *supra* note 39, at 139 (statement of W.P. Schmechel, President and Chief Operating Officer, Western Energy Co.).

for economic losses caused by mining.⁷²

The conference report recommended passage of the House Bill and President Carter signed the Surface Mining Control and Reclamation Act of 1977 in August of that year. Although the act requires surface owner consent before federal coal may be leased, it placed no restrictions on the price which may be negotiated between the surface owner and the operator.⁷³

IV. THE ACT AND IMPLEMENTING REGULATIONS

The act provides that the Secretary of the Interior shall not enter into any lease of federal coal deposits until he has received evidence of

72. *Id.*

We have been able to work with and reach agreement with a number of surface owners where Federal coal underlay their lands and we do not view their payments as exorbitant. We have seldom met a surface landowner who was unalterably opposed to mining. Indeed, as our record or successful reclamation has developed over the past 7 years the apprehensions and fears of ranchers and farmers have diminished measurably.

Senator Johnston of Louisiana, who has consistently opposed giving surface owners the right to withhold consent, continued to introduce amendments limiting their value, 123 CONG. REC. S 8004 (1977), "Believe me . . . one never will be able to buy an acre of that prime coal land for a thousand dollars. It will be more on the order of \$25,000 to \$40,000 an acre; or, for one of these homesteaded 640-acre tracts that are allowed for homesteading under the provisions I referred to, it will be \$900 million." *Cf.* 123 CONG. REC. S 8131 (1977) (remarks of Senator John Melcher of Montana): "I do not know of one instance where more than \$1,000 an acre has been paid; \$500 an acre is pretty big money. And there are plenty of places out there that can be bought for that." *Cf.* 1977 *Public Lands and Resources Hearings*, *supra* note 44, at 638 (statement of Edward M. Dobson, Northern Great Plains Representative, Friends of the Earth):

Allowing the Secretary to fix the value of surface overlying federal coal has encouraged many land owners to sell, some for high settlements, before a bill is enacted. In Montana, 2,800 acres of the Redding property and smaller plots . . . (all surface estate only) sold to Westmoreland Resources for about \$3,500 per acre. A nearly 1.3 acre county school site sold to Westmoreland for \$6,000. These lands are 30 miles from town but approach the value of urban commercial property. Other nearby ranchers, more anxious to sell early, received \$137 to \$200 per acre. Some sold at that price for fear of eminent domain.

But see 1977 *Hearings*, part 1, *supra* note 67, at 183 (statement of Dr. Arthur Hayes of Birney, Montana), "[T]he necessity for the United States Government to exercise its mineral interest in the land has already devalued the ranch units in the area and has made many of them unmerchantable."

73. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, REPORT TO ACCOMPANY S.7, SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, S. REP. NO. 128, 95th Cong., 1st Sess. 102 (1977):

[S]o that there will not be any undue locking up of Federal coal, no stipulation has been placed upon the amount and manner of negotiation between the prospective lessee and the surface owner.

This section will insure that the valuable agricultural lands under which lie deposits of Federal coal will not be unduly disturbed by surface mining.

By allowing direct negotiations between the lessee of the coal and the surface owner, individual safeguards can be agreed upon to benefit the land on a case by case basis, making it more likely that the surface owner will be able to remain on the land.

the surface owner's consent to enter and commence surface mining operations.⁷⁴ Valid written consents made prior to August 3, 1977 meet the requirements of the act.⁷⁵ When preparing comprehensive land use plans required under other provisions of the act, the Secretary is also directed to consult with any surface owner whose land is included in a proposed leasing tract regarding his preference for or against surface mining on his land.⁷⁶ The act provides that the Secretary shall, in his discretion, but to the maximum extent practicable, refrain from leasing coal deposits when a significant number of surface owners have expressed opposition to surface mining on their land.⁷⁷ The narrow definition of surface owner contained in the earlier versions has been preserved in this Act.⁷⁸

In reviewing the language of the 1977 Act and its legislative history, it is clear that the act is intended to give the surface owner an absolute veto power over any development of federal coal underlying his land. Subsection (c) of the Act specifically provides that the Secretary shall not enter into any lease of federal coal until the surface owner has given written consent to enter and commence surface mining operations.⁷⁹ In the regulations published July 19, 1979, the Department of the Interior views lack of consent as an absolute bar to leasing.⁸⁰

Even when consent has been given, the department has taken the

74. 30 U.S.C. § 1304(c) (1979).

75. *Id.*

76. 43 C.F.R. § 3420.2-3(3)(1) (1979).

77. 30 U.S.C. § 1304(d) (1979).

78. 30 U.S.C. § 1304(e) reads:

For the purpose of this section the term "surface owner" means the natural person or persons (or corporations, the majority stock of which is held by a person or persons who meet the other requirements of this section) who—

(1) hold legal or equitable title to the land surface;

(2) have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations; and

(3) have met the conditions of paragraphs (1) and (2) for a period of at least three years prior to the granting of the consent. In computing the three-year period the Secretary may include periods during which title was owned by a relative of such person by blood or marriage during which period such relative would have met the requirements of this subsection.

The surface owner protection section does not apply to Indian lands, 30 U.S.C. § 1304(f), or preference leases, 43 C.F.R. § 3427.0-7(a) (1979).

79. 30 U.S.C. § 1304(c) (1979).

80. 43 C.F.R. § 3427.1 (1979):

On split estate lands . . . where the surface is owned by a qualified surface owner, coal deposits that will be mined by methods other than underground mining techniques shall not be included in a lease sale notice without written consent from the qualified surface owner . . . allowing the lessee/operator to enter and commence surface mining operations.

position that it has discretion not to lease. This is not inconsistent with previous decisions under the Mineral Leasing Act, which grant the Secretary discretion not to lease even if other requirements are met.⁸¹ The Department of the Interior has adopted the view that the consent provision limits the Secretary's discretion by creating a condition precedent to the leasing of coal.⁸²

Whatever legal rationale is used to explain the process, the consent provision will almost certainly inhibit leasing despite the hope that the free negotiation of consents will encourage their being granted. Moreover, while one surface owner may refuse to allow mining on that part of his ranch or farm which lies over federal coal, a "significant number" can prevent the mining of substantially larger areas. The statute states that, "In order to minimize disturbance to surface owners from surface mining of federal coal deposits and to assist in the preparation of comprehensive land use plans," the Secretary is to ask surface owners whether they plan to consent to surface mining. If a "significant number" plan to withhold consent, that area is to be eliminated from further consideration.⁸³ No guidelines, however, are given to determine what is meant by a "significant number." Possibly, a very vocal and persuasive few might qualify as a "significant number,"

81. United States Department of the Interior, Office of the Solicitor, Surface Owner Consent Provision of P.L. 95-87 at 15 (Nov. 21, 1977) (unpublished memorandum). The department cites the following cases in support of this proposition: *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 418-19 (1931); *Burglin v. Morton*, 527 F.2d 486 (9th Cir. 1976); *Schraier v. Hickel*, 419 F.2d 663, 667 (D.C. Cir. 1969); *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976).

82. The Department reasons that the consent provision did not codify an already existing right to withhold consent because this would have been in effect a taking of the right from "non-qualified" surface owners. Because the right to withhold consent may not be freely transferred. The Department concludes that no property right in the usual sense has been granted. Noting that under § 1304(b) of SCMRA coal deposits are to be leased pursuant to the Mineral Lands Leasing Act, the Department concludes that the surface owner consent provision limits the Secretary's discretion to lease by making consent a condition precedent to the leasing.

83. 30 U.S.C. § 1304(d) (1979). Congress was apparently influenced by testimony about the negative effects mining would have on their communities. See *Department of the Interior's Future Leasing Program for the Federal Coal Resources of the Northern Great Plains: Hearings before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 462-70 (1974) (statement of Dean Kohrs, Central Wyoming Counseling Center, Casper, Wyoming). A pervasive fear of people in agriculture was that their water supply would be affected by mining on adjacent ranches. See 1973 *Environmental and Mining Hearings*, *supra* note 51, at 1307 (statement of Carolyn Alderson of Birney, Montana). See also 1977 *Public Lands and Resources Hearings*, *supra* note 44, at 637 (statement of Ed Dobson, Northern Great Plains Representative, Friends of the Earth): "[O]ngoing mining made life miserable . . . with blasting and other degradation. Water was affected and a well, three miles from the mine, destroyed. . . . Early blockbusting makes it impossible to hold on."

shutting out an area where other surface owners are enthusiastic about mining.

Conversely, if alternative lands are not available to meet a leasing target, the regulations provide that an area may still be considered for leasing, even though a "significant number" have expressed a negative preference.⁸⁴ An area land use plan which precludes surface mining may be amended if conditions change sufficiently.⁸⁵ Surface owners may decide they are in favor of mining, or "qualified" surface owners may sell their land to parties whose consent the Secretary does not require.⁸⁶

Surface owners may formally refuse to consent during the activity stage which follows land use planning in the leasing process.⁸⁷ Refusals *per se* are not accepted during the initial land use planning stage in order to ensure that surface owners will be completely informed before taking the option to refuse.⁸⁸

If the option to refuse is exercised, the land involved is to be dropped from further activity planning.⁸⁹ The refusal procedure was provided to give coal operators notice of decisions to refuse consent and to shield land owners from "continuing pressure."⁹⁰ Presumably, firm decisions are also helpful to the Department of the Interior in planning future surface mining in a given area.⁹¹

Refusals are controlling and may not be modified unless the area

84. 43 C.F.R. § 3420.2-3(e)(2) (1979) reads, in part: "In addition, the area may be considered acceptable for further consideration for leasing for development by other than underground mining techniques if there are no acceptable alternative areas available to meet the regional leasing target."

85. 43 C.F.R. § 3421.2-3(e)(3) (1979).

86. 43 C.F.R. § 3420.2-3(e)(3)(i) (1979).

87. 43 C.F.R. § 3427.2(a)(2) (1979).

88. 44 Fed. Reg. 42,595 and 42,596 (1979). (Discussion of Comments to Specific Sections).

89. 43 C.F.R. § 3420.4-1(b) (1979).

90. 44 Fed. Reg. 42,596 (1979). (Discussion of Comments to Specific Section).

91. The basic stages in the leasing process are: 1) land use planning; 2) the adoption of regional coal production goals; 3) activity planning, which includes tract delineation, ranking selection and scheduling and 4) lease sale. Only lands in a known recoverable coal resource area with a high or moderate development potential are to be evaluated for land use planning. 43 C.F.R. §§ 3420.1-3, 3420.2-3(a). Also eliminated are areas in which a "significant number" of surface owners have expressed a preference against mining. A number of persons expressing a change of preference could trigger the amendment of a land use plan. 43 C.F.R. § 3420.2-3(e). Hearings, if they are requested, shall be conducted on proposed plan uses. 43 C.F.R. § 3420.2-4. Before a plan is adopted, the Department of the Interior shall consult with state officials and Indian Tribes, if appropriate, to determine if the plan meets their suitability standards.

Regional coal production goals provided by the Department of Energy are to be adopted biennially by the Secretary, in consultation with the Department of Energy, affected states and Indian tribes. These established coal needs shall guide the department in the

land use plan is amended.⁹² This regulation ensures that refusals, because of their long-term effect, will not be "lightly made."⁹³

V. PROBLEMS

Given this rather pervasive statutory and regulatory backdrop, the private practitioner, when either advising a surface owner or a mineral developer client, is faced with several immediate problems and some of greater subtlety. Initially, the practicing lawyer must be concerned with the validity of consents. The Act reads, in part, "The Secretary shall not enter into any lease of federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations. . . ."⁹⁴ The Department of the Interior has taken the position that, before a lease may issue, the consent document must truly

third stage, activity planning, the process of choosing tracts to be leased. 43 C.F.R. § 3420.4-1(a).

Land areas where surface owners have formally refused consent are deleted from consideration in activity planning. 43 C.F.R. § 3420.4-4(b). When areas to be considered for leasing have been identified, the department will make a call for expression of leasing intent. 43 C.F.R. § 3420.4-2.

Preliminary tract delineation will then be made based upon such things as 1) expressions of leasing interest, 2) technical data of coal recovery such as sulphur content, seam thickness, overburden and reserve tonnage, 3) consideration of maximum recovery, ownership patterns, and potential mining units, and 4) surface ownership, including surface owner preferences, and the existence of surface owner consents and their terms. 43 C.F.R. § 3420.4-3(b).

Leasing tracts will then be selected and ranked and lease sales scheduled to accommodate regional leasing targets. 43 C.F.R. § 3420.4-4(a). The tracts on the natural environment and socioeconomic impacts. 43 C.F.R. § 3420.4-4(b). Notice of intent to rank tracts shall be published regionally and in the Federal Register, 43 C.F.R. § 3420.4-4(d), and the results of the ranking process, including proposed ranking, alternate tract selections, and the proposed schedule shall be published in the regional environmental impact statement. Comments from interested parties will then be accepted, 43 C.F.R. § 3420.4-4(e), and public meetings held. Final recommendations as to alternative tract selection and ranking will be made by the Secretary. 43 C.F.R. § 3420.4-4(c). The Secretary shall also consider the written consents received and, other factors being equal, tracts for which consents have been received will be chosen for inclusion over those for which no consents have been received. 43 C.F.R. § 3420.6-1. The deadline for the submission of written consents shall be announced in the Federal Register at the time the final lease sale environmental impact statement is made. 43 C.F.R. § 3420.6-2.

The lease sale stage includes an estimate of fair market value made after the evaluation of public comment and of coal resource economic value and maximum economic recovery as determined by the United States Geological Survey. 43 C.F.R. § 3422.1-1. Notice of lease sale follows and includes the time and place, the bidding method and the minimum bids which will be considered. 43 C.F.R. § 3422.2(1).

It shall include, if appropriate, copies of written consents and their terms, including payments which the high bidder will have to make. 43 C.F.R. § 3422.2(b)(c)(10). The actual lease sale will follow.

92. 43 C.F.R. § 3427.2(j) (1979).

93. 44 Fed. Reg. 42,596 (1979). (Discussion of Comments to Specific Sections).

94. 30 U.S.C. § 1304(a) (1979).

give "consent to enter and commerce surface mining operations."⁹⁵ Anything less is not a valid consent. A consent document that reserves the right to reconsider consent or to withdraw approval before or after mining commences, or which grants heirs or assignees the same reconsideration powers, is, in all likelihood, not a consent "to enter and commence surface mining operations" and the Secretary cannot lease the tract.⁹⁶ Obviously, care must be taken in drafting such a consent to insure that any such qualifications are eliminated.

A question of equal concern involves the revocability of consents. Nothing in the Act precludes the surface owner from revoking his consent. Accordingly, it is arguable that up until the time of lease issuance, surface owner consent may be revoked. In that case, the Secretary would be precluded from leasing federal coal for development purposes. It is, of course, possible that the surface owner would be held liable for breach of contract in a private action by the party who had secured consent. Negotiating such agreements, particularly on behalf of a coal developer, may necessitate using language stating consent is irrevocable and binding upon the heirs and assignees of the surface owner. This would provide some modicum of protection, at least in a private suit for breach of contract.

The Department of the Interior has taken the position that, at the point of lease issuance, a valid consent is irrevocable. The Department's rationale is that the consent provision's purpose has been served and issuance of a lease creates vested rights.⁹⁷ The regulations make no mention of how the department would handle an attempted revocation of consent in such circumstances, short of declaring such actions invalid and notifying the person revoking of such invalidity. The person revoking is then left with his right to seek a judicial determination whether consents are revocable or not.

It is also important in negotiating consents to understand the qualifications of a "surface owner" under the terms of the act.⁹⁸ Federal coal under land owned by surface owners who are not "qualified" surface owners,⁹⁹ may be leased without that owner's consent. Surface owners whose consent is required are individuals or family corpora-

95. United States Department of the Interior, Office of the Solicitor, Surface Owner Consent at 3 (August 15, 1978) (unpublished memorandum).

96. Consent documents will probably be comprehensive and may include such things as agreements to reclaim certain areas to an irrigable condition. See 1977 *Hearings*, part 1, *supra* note 67, at 181 (statement of Dr. Arthur Hayes, President, Brown Cattle Co., Birney, Montana). The only necessary provision, however, is consent "to enter and commence" surface mining. Department of the Interior Memorandum, *supra* note 95, at 11.

97. Department of the Interior Memorandum, *supra* note 95, at 2 and 3.

98. Surface owner, definition, *supra* note 78.

99. 43 C.F.R. § 3400.0-5(pp) (1979).

tions who hold legal or equitable title to the surface. They must have their principal residence on the land, or personally conduct a farming or ranching operation there, or directly receive a significant portion of their income from that farming or ranching operation.¹⁰⁰ These requirements must have been met for at least three years before the granting of consent.¹⁰¹

In defining the surface owner in this limited way, Congress intended to protect individuals who had a personal interest in preserving the result of their or their ancestors' efforts in developing a particular ranching operation.¹⁰² The requirement of three years of ownership prevents the transfer of land surfaces as a means of speculating in consents.¹⁰³ In all likelihood, an attorney would have to run some type of title search to ensure these qualifications are met.

An additional concern for the coal developer not addressed by the Act is whether the consent of persons other than the surface owner may be required. These might include persons who have been granted easements across the surface owner's land, mortgages, or any other person having a lien upon the surface owner's estate. The act in its definition of surface owner does not contemplate that the consent of such persons is necessary. However, again out of an abundance of caution, it may be

100. Surface owner, definition, *supra* note 78. This concept was explained in early committee reports and was never the subject of controversy. See CONFERENCE REPORT TO ACCOMPANY S. 425, H.R. DOC. NO. 1522, 93d Cong., 1st Sess. 82 (1974),

The conferees do not intend by this to impose an arbitrary or mechanical formula for determining what is "significant." This should be construed in terms of the importance of the amount to the surface owner's income. "Significant" is not intended to be measured by a fixed percentage of income. For example, where a person's gross income is relatively small, a loss of but a fraction thereof may be significant.

101. Surface owner, definition, *supra* note 78. The Federal Register definition of a "qualified surface owner" is somewhat different, paragraph (3) reading, "Have met the conditions of paragraph (1) and (2) of this subsection for a period of at least 3 years, except for persons who gave written consent less than 3 years after they met the requirements of both paragraphs (1) and (2) of this section." 43 C.F.R. § 3400.0-5(pp) (1979). The language was probably added to solve the following problem that could arise under the language of the statute. Should a farmer buy the surface in 1980 and grant consent in 1982, the Secretary could grant a lease in 1984 without consulting that farmer. Even though he had farmed for four years before the lease was granted, he had not farmed three years before granting consent.

102. Congressional recognition of this factor was evident in the language of legislation which set the value of consent. See CONFERENCE REPORT TO ACCOMPANY H.R. 25, H.R. DOC. NO. 189, to the surface owner's interest, "the appraisers shall determine and add the value of . . . the following losses . . . (5) such additional reasonable amount of compensation as the Secretary may determine is equitable in light of the length of the tenure of the ownership. . . ."

103. See CONFERENCE REPORT TO ACCOMPANY S. 425, S. DOC. NO. 1522, 93d Cong., 2d Sess. 82 (1974), "By so defining 'surface owner,' the conferees seek to prevent speculators purchasing land only in the hope of reaping a windfall profit simply because Federal coal deposits lie underneath the land."

wise to secure the consent of such persons since their equity in the surface may be destroyed by surface mining operations.

The concept of benefits received for granting consent warrants additional comment which may prove useful to persons representing both surface owners and coal developers. In the past, it has not been unusual for a surface owner to reserve a royalty interest in coal to be mined as part of the consideration for granting his consent. The question arises as to whether the reservation of a royalty interest by a surface owner violates the surface owner consent provision of the 1977 act. There is nothing in the statutory language itself which prohibits a surface owner from reserving such an overriding royalty interest. But nowhere in the legislative history is there an indication that surface owners should be allowed payment for consent in any manner related to the amount of coal reserves under the surface estate. Montana Senator John Melcher, in particular, argued against such royalty interest reservations.¹⁰⁴ In short, this is one more area which awaits judicial resolution. In the meantime, the private practitioner should clearly explain the risks to his client.

Finally, it must be determined whether surface owner consent is transferable and who pays for the consent. The act and the regulations impose no requirements or restrictions on who may obtain consent. However, Department of the Interior policy greatly restricts the class of those who would be willing to buy. First the department has eliminated itself.

[T]he Department of the Interior will not acquire or negotiate consents from qualified surface owners. This task will be left to the Industry and the private marketplace. . . .¹⁰⁵

This position relieves the department of problems with consideration and enforceability of contracts.

Second, to be valid, a consent must be transferable as set out in the regulations.¹⁰⁶ Two alternate schemes for payment upon transfer can

104. See 123 CONG. REC. S. 8128 (1977):

MR. MELCHER. There is nothing the Mineral Leasing Act and nothing in this bill that would intimate that a surface owner was in any way entitled to a royalty on the Federal coal.

MR. FORD. If he has the privilege of denying or accepting the severance of the coal, would he not then have the right to say, "In lieu of so much per acre, I want 25 cents per ton royalty on the coal mined," or, "I want 50 cents per ton royalty?" Would he not have that privilege?

MR. MELCHER. I say, in answer to the question, that the bill does not preclude it; but the bill does not suggest it nor does the Mineral Leasing Act, under which these leases are let, suggest it.

105. 44 Fed. Reg. 42,596 (1979).

106. The right to enter and commence mining is transferable to whoever makes the successful bid in a lease sale for a tract which includes the lands to which the consent applies. A written consent shall be considered transferable only if, at a minimum, it allows that after the lease sale for the tract to which the consent ap-

be used. The first contemplates payment to the surface owner after the bidding. In this situation, it would seem necessary to ensure the consent agreement is binding on the surface owner before payment. Non-binding consent does not appear to meet the requirement of allowing an operator to enter and commence surface operations. In the second scheme, the minimum of transferability is achieved if the consent provides that "the successful bidder may reimburse the party that first obtained the consent for the purchase price of the consent."¹⁰⁷ Presumably, most transfers will come about when the consent automatically devolves to the successful bidder who reimburses the previous holder for the purchase price. The meaning of "purchase price" eliminates much of the appeal of speculation. The Department of the Interior has taken a firm position that only the actual payment made to the surface owner is reimbursable:

A few comments requested that § 2427.2(e) be revised to specify that holders of transferable consents be compensated by the successful bidder for the overhead or "administrative" cost of acquiring the consent as well as any actual consideration already paid to the surface owner for his consent. This change was not made because the Department of the Interior has no obligation to require one bidder to reimburse another bidder for its overhead, salary and related expenses.¹⁰⁸

Therefore, under the interpretation of the Department of the Interior, only the actual compensation paid to the surface owner is reimbursable. Costs of acquisition need not be paid by a successful bidder who, by the terms of a valid consent, can acquire the consent by paying the surface owner or reimbursing the previous holder. This mechanism in all likelihood takes the profit out of independent speculation. From the department's point of view, this mechanism can also lessen a perceived conflict between uncontrolled consent costs and the requirement that the department received fair market value for the coal.¹⁰⁹

Against this regulatory scheme, the question remains as to the effect these restrictions on speculation might have on a broker. Traditionally, brokers have served a valuable function in putting together coal "plays" by locating and leasing or purchasing blocs of land of sufficient size to support a profitable mining venture. Once the "play" was put together, the broker then peddled the project to a concern actually interested in mining the property. All of this, of course, was done not

plies (i) the payment for the consent may be made by the successful bidder of (ii) the successful bidder may reimburse the party that first obtained the consent for the purchase price of the consent; . . . 43 C.F.R. § 3427.2(e)(1) (1979).

107. 43 C.F.R. § 3427.2(e)(1)(ii) (1979).

108. 44 Fed. Reg. 42,596 (1979) (Discussion of Comments to Specific Sections).

109. SOLICITOR'S OPINION M-36909, 86 I.D. 28 (1979).

by the broker out of charity, but in hopes of realizing a profit for his work. If consent can only be transferred at original cost, the broker loses his incentive to put the "play" together. In effect, this means the mining companies themselves will have to engage in land acquisition rather than depend upon brokers, unless some means is devised for compensating the broker in ways other than the traditional methods.

CONCLUSION

The conflict between the class of persons affected by the presence of federal coal under their surface estates and the American public which claims that coal clearly had to be resolved by Congress. Congress, in its attempt to solve many of the problems created at the turn of the last century, may have created more problems for the ranchers and mineral developers of the next, not to mention the attorney who must advise each. Absent clarifying judicial decisions or remedial legislation, the private practitioner must walk a narrow line in his advice and avoid the obvious pitfalls, while at the same time applying a common sense approach to those that are more obscure.¹¹⁰

APPENDIX

§ 1304. *Surface owner protection*

(a) *Applicability.* The provisions of this section shall apply where coal owned by the United States under land the surface rights to which are owned by a surface owner as defined in this section is to be mined by methods other than underground mining techniques.

(b) *Lease of coal deposits.* Any coal deposits subject to this section shall be offered for lease pursuant to section 2(a) of the Mineral Lands Leasing Act of 1920, as amended [30 USCS § 201(a)].

(c) *Consent of surface owner.* The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has obtained evidence of such consent. Valid written consent given by any surface owner prior to the enactment of this Act [enacted

110. This paper has touched on only some of the more obvious problems and is not intended to be exhaustive. For example, there appears to be a fruitful area for analysis and comment in trying to reconcile the surface owner consent provision and section 2(a) of the Mineral Lands Leasing Act which requires the Secretary to accept no bids for coal leases which are less than fair market value determination and how such determinations are to be made needs further evaluation. Whether the consent provision has given surface owners a new right, has codified an old right, or has created a condition precedent to the Secretary's discretion to lease is an important determination yet to be made in solving this problem and others that may arise.

Aug. 3, 1977] shall be deemed sufficient for the purposes of complying with this section.

(d) *Consultation with surface owner as to preferences.* In order to minimize disturbance to surface owners from surface coal mining of Federal coal deposits and to assist in the preparation of comprehensive land-use plans required by section 2(a) of the Mineral Lands Leasing Act of 1920, as amended [30 USCS § 201(a)], the Secretary shall consult with any surface owner whose land is proposed to be included in a leasing tract and shall ask the surface owner to state his preference for or against the offering of the deposit under his land for lease. The Secretary shall, in his discretion but to the maximum extent practicable, refrain from leasing coal deposits for development by methods other than underground mining techniques in those areas where a significant number of surface owners have stated a preference against the offering of the deposits for lease.

(e) *"Surface owner" defined.* For the purpose of this section the term "surface owner" means the natural person or persons (or corporation, the majority stock of which is held by a person or persons who meet the other requirements of this section) who—

- (1) hold legal or equitable title to the land surface;
- (2) have their principal place of residence on the land; or personally conduct farming or ranching operations upon a farm or ranch unit to be affected by surface coal mining operations; or receive directly a significant portion of their income, if any, from such farming or ranching operations; and
- (3) have met the conditions of paragraphs (1) and (2) for a period of at least three years prior to the granting of the consent.

In computing the three-year period the Secretary may include periods during which title was owned by a relative of such person by blood or marriage during which period such relative would have met the requirements of this subsection.

(f) *Indian lands.* This section shall not apply to Indian lands.

(g) *Property rights unaffected.* Nothing in this section shall be construed as increasing or diminishing any property rights by the United States or by any other landowner.